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71-1632

Supreme Court
FILED
JUN 16
MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1971

No.

CAST OPTICS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	9
Conclusion	14

APPENDIX:

Decision and Order of the National Labor Relations Board	1a
Trial Examiner's Decision	4a
Opinion of Court of Appeals	38a
Judgment of Court of Appeals	57a
Petition for Rehearing	59a
Denial of Petition for Rehearing	64a

Citations

CASES:

Boeing Airplane Co. v. N.L.R.B., 174 F.2d 988 (C.A.D.C. 1949)	9, 11, 13
Burlington Truck Lines, et al. v. U.S., et al., 371 U.S. 156 (1962)	12
Confectionary & Tobacco Drivers Union v. N.L.R.B., 312 F.2d 108 (C.A. 2, 1963)	9, 10

PAGE

CASES (Cont'd):

F.W. Means v. N.L.R.B., 377 F.2d 683 (C.A. 7, 1967) 12

Graham v. Boeing Airplane Co., 22 LRRM 2243, 15 Labor Cases, par. 64, 604 (1948) 9

Jacobsen v. N.L.R.B., 120 F.2d 96 (C.A. 3, 1941) .. 12

N.L.R.B. v. American Federation of Television and Radio Artists, 285 F.2d 902 (C.A. 9, 1961) 12,13

N.L.R.B. v. Capital Transit, 221 F.2d 864 (C.A. D.C., 1955) 12

N.L.R.B. v. Community Motor Bus Co., 439 F.2d 965 (C.A. 4, 1971) 9, 10n, 14

N.L.R.B. v. E.A. Laboratories, Inc., 188 F.2d 885 (C.A. 2, 1951), cert. den. 342 U.S. 871 10

N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) 13

N.L.R.B. v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (C.A. 5, 1955) 10n, 12, 14

N.L.R.B. v. Sands Mfg. Co., 306 U.S. 332 (1939) .. 9, 11

NL.R.B. v Wallick & Schwalm Co., 198 F.2d 477 (C.A. 3, 1952) 9, 10

Poloron Products of Indiana, 177 N.L.R.B. No. 54 (1969) 10, 11n, 14

S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) 12

United Furniture Workers of America, Local 207 v. N.L.R.B., 336 F.2d 738 (C.A.D.C. 1964), cert. den. 379 U.S. 838 .....9, 11, 13

U.S. v. Oregon State Medical Association, 343 U.S. 326 ..... 13n

PAGE

TREATISE:

Davis, 2nd Administrative Law Treatise, Section 16.05 (1958) 12

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*)

Section 8(a)(1) 6, 7

8(a)(3) 6, 7

8(a)(5) 6, 7

8(d) 13

8(d)(4) 2, 7, 13, 14

Supreme Court of the United States

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No.

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TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Intervenor.

———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Cast Optics Corporation, petitioner herein, prays that a writ of certiorari issue to review a decision and judgment of the United States Court of Appeals for the Third Circuit enforcing an order of the National Labor Relations Board.

Opinions Below

The decision of the Court of Appeals was handed down on March 23, 1972, and is unreported. The Court's judgment was entered on April 20, 1972. On May 17, 1972, the Court denied petitioner's request for a rehearing. The order of the National Labor Relations Board and the Trial Examiner's decision which the Board adopted is reported at 184 NLRB No. 1. The Opinion of the Court and its judgment, the Trial Examiner's decision, the Board's order

and the Petition for Rehearing are printed in the Appendix to this petition.[1]

Jurisdiction

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the court below was in error in failing to remand the case to the Board for a finding on the issue of whether, after a return to work following a concededly illegal strike, the post-strike activities of the employees and the Union abrogated or vitiated the Employer's condonation of such strike.

2. Whether employees who have lost their status as employees under Section 8(d)(4) of the Act because of their participation in an illegal strike, regain such status immediately upon their return to work whether or not they continue to engage in further illegal activities in the plant upon such return.

3. Whether an employer is required by the Act to continue to bargain with a Union representing its employees where, after a concededly illegal strike, the employer takes back the employees with a promise of no reprisals, but immediately after the return to work the employees and the Union continue to engage in illegal activities.

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. Section 151 *et seq.* are as follows:

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[1] "A" references are to material in the Appendix to this Petition. "CA" references are to material in the certified Appendix filed in the court below. The list of employees ordered reinstated has been omitted from the Trial Examiner's Decision in the Appendix.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

"Sec. 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

"(5) to refuse to bargain collectively with the representatives of his employees * * *

"Sec. 8(d) . . . [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to a contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof. . . .

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Statement of the Case

Petitioner, Cast Optics Corporation, (hereinafter "Employer") was engaged in the manufacture of acrylics, plastic sheets and related products. It had a collective bargaining agreement with Local 656, Textile Workers Union of America, AFL-CIO, the Intervenor, (hereinafter "Union"), the exclusive bargaining representative of the employees, which by its terms provided for expiration on November 7, 1969, but allowed for modification following 60 days notice contemplating such action delivered prior to that date (C.A. 176-177). The agreement also contained a no-strike clause (C.A. 165-6).

On May 13, 1969, almost six months in advance of the November 7 contract termination date, the Union presented to the Employer a list of demands proposing contract changes relating to wage increases and various improvements in other benefits, and requested that discussions thereon commence at the earliest possible time.

At approximately the same time during the month of May the Employer decided on May 19 to transfer one Hernandez, who was the secretary-treasurer of the Union

local, from his job as inspector in the quality control department to inspector in the glass department. Hernandez would not accept the transfer and was subsequently discharged on May 22. The following morning, May 23, the employees, all of whom were Union members, reported to work but in response to the discharge of Hernandez refused to perform any of their assigned duties, notwithstanding the entreaties of supervisors that such a refusal would cause damage to the Company's machinery and equipment as a result of the hardening of the liquid acrylic substance used in the manufacturing process, which would freeze if not poured on schedule.

On the next workday, May 26, the employees again reported to the plant, but this time they were met at the plant entrance by Company officials who advised them that each man would be admitted only on the condition that he perform his usual duties; if he failed to work after entering the plant, he would be fired. Only a few of the plant's 200 employees agreed to these terms and resumed their jobs. The rest continued their strike. Meetings were subsquently held that day between management, employees and officials of the Union. The Union demanded that Hernandez be reinstated and insisted that the various economic demands submitted by the Union earlier in the month be granted by the Company. The Employer rejected these demands and the strike continued until May 29, at which time it was abandoned, the employees returning to work after the Employer threatened to discharge those who continued to participate in the strike. The day the employees returned to work, the Employer promised that there would be no reprisals taken against any of them, nor any discharges or harassment.

Following the return to work on May 29, the Employer attempted to resume normal production. However, during the first full week in June it was confronted with slow down tactics on the job as well as absenteeism on an excessive scale.

In addition, the Union continued during that period to press its economic demands first presented to the Employer on May 13.

In view of the continuation of the improper and illegal conduct of the employees and the Union after the return to work, and its consequent disruption of the orderly business in the plant, the Employer withdrew its recognition of the Union on June 9, and refused to bargain with it as the statutory representative of its employees. Thereupon, on June 30, the employees again went out on strike. On July 3, the Employer discharged the strikers and thereafter made no reply to the request for reinstatement.

Following charges by the Union, the National Labor Relations Board (hereinafter "Board") issued its complaint against the Employer alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended 29 U.S.C. Sec. 151 *et seq.* (hereinafter "Act").

After denying the commission of any unfair labor practice, the Employer filed an affirmative defense which, *inter alia,* read as follows:

> "The Union's and employees' actions referred to in paragraph 6 of complaint continued even after the employer took the employees back to work on May 29, 1969 and said actions were then converted into a form of slow-down activities, deliberate absenteeism, sabotage of plant equipment and material, and a general pattern of conspiracy designed to impress the economic demands of the Union upon the Company all of which was a further substantial and material breach of the collective bargaining agreement, thereby discharging the employer from any and all further obligations under said contract."

During the hearings before the Board, the Trial Examiner received in evidence the Employer's testimony in support of such affirmative defense about absenteeism and

slowdown, as well as evidence that the Union continued to press its untimely economic demands for changes in the contract (C.A. 105-106, 112-113, 116-119, 76-77).

The Trial Examiner found that the May 23-29 strike was Union-instigated and was illegal because in violation both of the collective bargaining agreement and Section 8(d)(4) of the Act. He further found that the Employer had condoned such illegal conduct by taking the employees back with a promise of no reprisals.

On the basis of such condonation, the Trial Examiner further found and ruled that the Employer violated Section 8(a)(5) and (1) when it refused to recognize and bargain with the Union after the return to work and that it had also violated Section 8(a)(1) and (3) of the Act by discharging and harassing employees who went on strike in protest of the refusal to bargain and who were refused reinstatement.

On the issue framed by the Employer's affirmative defense and the evidence offered and accepted in support thereof, the Trial Examiner found it "unnecessary" to make any findings. He said:

> "In further defense of its action Respondent sought to establish by absentee records a slowdown campaign in June which it would attribute to the Union. I find it unnecessary to determine if such a condition existed. But if indeed it did exist Respondent's remedy for such improper conduct, either by the employees or by the Union, would not include resort on its part to a violation of the Act." (A. 29, n. 24)

Accordingly the Trial Examiner recommended an appropriate Order.

The Board in its Decision and Order (A.), after considering *inter alia* the Employer's exceptions to the Trial Examiner's Decision,[2] adopted the findings, conclu-

[2] Exception C of the Employer's Exceptions to the Examiner's Decision reads in part as follows:

sions and recommendations of the Trial Examiner and issued its Order. Thereafter the Board applied to the court below for enforcement.

The Court of Appeals in its decision upholding the Board ruled as follows:

1) That the May 23-29 work stoppage was illegal and that accordingly the employees were stripped of their protection against discharge under the Act and the Union lost its status as the bargaining representative of the employees.

2) That whether or not the Employer condoned such illegal conduct, "when all of its employees who had engaged in the illegal work stoppage of May 23-29 returned to work, they regained their status as employees [17] and likewise, the Union regained its position as the bargaining representative of the employees. Thus on May 29 both the Union and the workers were entitled to the protection of the Act" (Footnote 17, omitted).

3) That, in any event, had the Trial Examiner elected to make a finding on the issue of the continued illegal activities of both the employees and the Union, he would not have credited the testimony offered by the Employer in support of its claim that such activities vitiated or abrogated the Employer's condonation of the illegal work stoppage. The court furthermore ruled that the testimony offered on absenteeism and slowdown was in any event insufficient to establish vitiation or abrogation of such condonation. It therefore refused to remand the case to the Board.

The Employer thereupon filed a Petition for Rehearing (A. 59) which, *inter alia*, set forth that the court had failed to note that the Union's untimely and illegal eco-

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"Respondent Cast Optics Corporation takes exception to the Trial Examiner's conclusion that the facts surrounding the May 23rd strike and the return of the workers May 29th supports the law of condonation. (See Trial Examiner's Decision, pp. 13-14.)"

nomic demands were again urged on the Employer immediately after the employees returned to work following the May 23-29 strike. The court denied the petition.

Reasons for Granting the Writ

1. This case raises important questions in the administration and interpretation of the National Labor Relations Act, as amended, and not theretofore determined by this Court concerning the condonation doctrine which the Board has applied in situations where employees and their Union representative have engaged in illegal, unprotected strike activities, but the employer has agreed to forgive such illegal activity and has taken the employees back to work on a promise of no reprisals.

Where the employer has not condoned such activity, he is under no legal compulsion to take the strikers back. *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332, 334 (1939); *United Furniture Workers of America, Local 270* v. *N.L.R.B.*, 336 F. 2d 738, 741 (C.A.D.C. 1964), *cert. den.* 379 U.S 838; *Boeing Airplane Co.* v. *N.L.R.B.*, 174 F. 2d 988, 991 (C.A.D.C., 1949) The employees may be discharged, the Union loses its status as their bargaining agent, and the employer is under no statutory duty to bargain with the Union. *United Furniture Workers of America, supra*; *Boeing Airplane Co., supra*; *Graham* v. *Boeing Airplane Co.*, 22 LRRM 2243, 15 Labor Cases ¶ 64, 604 (1948).

Where the employer does condone such illegality he has demonstrated a "willingness to forgive the improper aspect of concerted action, 'to wipe the slate clean' ". *Confectionary & Tobacco Drivers Union, Local 805* v. *N.L.R.B.*, 312 F. 2d 108, 113 (C.A. 2, 1963); *N.L.R.B.* v. *Community Motor Bus Co.*, 439 F. 2d 965 (C.A .4, 1971); *N.L.R.B.* v. *Wallick & Schwalm Co.*, 198 F. 2d 477 (C.A. 3, 1952). Thereafter he may not rely on the former illegal activity as grounds for reprisal, including a refusal to bar-

gain with the Union. *N.L.R.B.* v. *Wallick & Schwalm, supra*: *N.L.R.B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885 (C.A. 2, 1951) *cert. den.*, 342 U.S. 871.

The case at bar raises the important question of the effect upon the employer's prior condonation of continued improper and illegal activities by both employees and the Union following a return to work after a no-reprisals promise by the employer. Because the condonation principle rest upon "a clear public interest in the prompt settlement of labor disputes" *Confectionary & Tobacco Drivers Union, supra,* such continued illegal activity after a return to work negatives application of the doctrine. The issues that then arise as to the status of the employees and the Union are clearly of considerable importance in the Board's administration of the Act and its policies.

2. The employer herein set up, as an affirmative defense to the Board's unfair labor practice charges, the claim that upon the return to work after the employer's no-reprisals promise following a concededly illegal strike, the employees and the Union continued to engage in improper and illegal activities in the plant. The employer presented evidence, which the Trial Examiner accepted as part of that defense, that the employees engaged in slow down tactics and in deliberate absenteeism, and that the Union continued to press its untimely and illegal demands for changes in the collective bargaining agreement (C.A. 5, 106, 118, 204, 214).

Under the Board's theory and ruling in *Poloron Products of Indiana*, 177 N.L.R.B. No. 54 (1969)[3], such a defense, if established, would have negated the employer's original promise that there would be no reprisals for the

[3] The Board's analysis of the condonation doctrine in *Poloron* is basically cast in contractual terms. See Also *N.L.R.B.* v. *Marshall Car Wheel & Foundery Co.*, 218 F. 2d 409 (C.A. 5, 1955) and *N.L.R.B.* v. *Community Motor Bus Co.*, 439 F. 2d 965 (C.A. 4, 1971).

original illegal strike. The employer would therefore be free to discharge original strikers and to refuse to bargain with the Union. *N.L.R.B.* v. *Sands Mfg. Co.; United Furniture Workers of America Local 270* v. *N.L.R.B.; Boeing Airplane Co.*, all *supra.*

The issue presented by the employer's claim was therefore crucial to a decision on the Board's charges of violations of the Act. Nevertheless, the Trial Examiner failed to make any findings on the claim and laconically dismissed the evidence in a footnote (A. 29, n. 24) saying:

> "In further defense of its action Respondent [employer] sought to establish by absentee records a slow-down campaign in June which it would attribute to the Union. I find it unnecessary to determine if such a condition existed . . ."[4]

Nor did the Board, make any findings with respect to the claimed post-strike misconduct. In its Decision and Order affirming the Trial Examiner, it merely said (A. 2, n. 3) that ". . . when Respondent hired back the strikers, they retained their right under the Act to be represented by the Union as their bargaining representative."

The Board thus not only totally disregarded the employer's evidence and its legal effect upon the application of the condonation doctrine in light of *Poloron*, but it overlooked as well the basic purpose served by that doctrine in the effectuation of the policies of the Act.

3. The ruling of the court below refusing to remand the case to the Board in order for it to make findings from the

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[4] The Trial Examiner went on: "But if indeed it did exist Respondent's remedy for such improper misconduct either by the employees or by the Union, would not include resort on its part to a violation of the Act."

This is, of course, true, but according to *Poloron* the employer, if the Union and employees were guilty of post-strike misconduct, would not be guilty of statutory violations.

record concerning the absenteeism and the slow down[5] compounded the error of both the Trial Examiner and the Board.

This Court has repeatedly emphasized the necessity for an administrative agency to make findings on the material issues before it and the cogent reasons for such necessity. Without findings " '*expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion' " *Burlington Truck Lines et al.* v. *U. S. et al.,* 371 U.S. 156, 167-168 (1962). See, also *S.E.C.* v. *Chenery Corp.,* 318 U.S. 80 (1943).

While *Burlington* is not an N.L.R.B. proceeding, the necessity for the Board to make findings on the material issues before it is similarly stressed in *F. W. Means* v. *N.L.R.B.,* 377 F. 2d 683, 687 (C.A. 7, 1967), *N.L.R.B.* v. *American Federation of Television and Radio Artists,* 285 F. 2d 902, 903 (C.A. 9, 1961) and *N.L.R.B.* v. *Capital Transit,* 221 F. 2d 864, 867 (C.A.D.C., 1955) and *N.L.R.B.* v. *Marshall Car Wheel & Foundry Co., supra* (C.A. 5, 1955).

The authorities on administrative law are in accord. See e.g. Davis, 2nd Administrative Law Treaties, Sec. 16.05 (1958).

The Third Circuit itself in *Jacobsen* v. *N.L.R.B.,* 120 F. 2d 96, 99 (1941) was faced with the Board's failure to make a crucial finding. It remanded the case to the Board pointing out the necessity of findings and the Board's duty to make them. On the issue of the necessity to make findings on critical issues, *Jacobsen* and the instant cases are indistinguishable.

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[5] The employer's Petition for Rehearing emphasized that the court below in its Opinion failed to note that immediately after the return to work following the illegal strike, the Union's untimely and illegal economic demands were again urged on the employer.

The lower court's failure to remand the case at bar for a finding on the crucial issue of the post-strike activities is then not only in conflict with its own decision on *Jacobsen,* but with the decisions of the other Circuits cited above.[6]

4. The court below agreed with the Board's findings that the May 23-29 strike was in violation of Section 8(d) of the Act. As a result, the workers lost their status as employees under the Act and the Union lost its own status as their bargaining representative. The Employer was under no legal duty neither to reemploy the workers, *N.L.R.B.* v. *Fansteel Metallurgical Corp.* 306 U.S. 240, 259 (1939) nor to bargain with their Union, *Boeing Airplane Co.* v. *N.L.R.B., supra; United Furniture Workers of America, supra.*

The court ruled however that, even assuming the existence of post-strike illegal activities, the mere fact that the workers were taken back by the Employer was sufficient immediately to restore their status as employees and the status of the Union as bargaining representative as well.

The court relied for this holding on that portion of Section 8(d)(4) which reads as follows:

> "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of the Act, as amended,

[6] The lower court in its opinion disclaimed any intention to make its own finding with respect to the events occurring after the illegal strike. It nevertheless found (A. 48) that had the Trial Examiner elected to make such a finding, he would not have credited the employees' testimony on the post-strike activities. The disclaimer notwithstanding, the lower court in effect took upon itself the task of fact finding which is the exclusive province of the Board. Cf. *United States* v. *Oregon State Medical Association,* 343 U.S. 326, 349.

> but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The court in so ruling interprets the word "reemployed" without regard to any conditions under which the workers were restored to employment by their employer.

Such a ruling appears to be in conflict not only with the Board's decision in *Poloron, supra,* but also with the decision of the Fourth Circuit in *N.L.R.B.* v. *Community Motor Bus Co., supra,* and the Fifth Circuit in *N.L.R.B.* v. *Marshall Car Wheel & Foundry Co., supra.* These decisions stress the contractual nature of the return to work after an illegal strike. The workers are reemployed only on condition that, in exchange, they resume their normal working relationships in the plant. To hold otherwise, as the court below did, is to transfer the disruption caused by the illegal strike from outside the plant back into the plant. The public interest in the prompt settlement of labor disputes as well as the overall policy of the Act to further industrial peace would appear to be adversely affected by the ruling of the court below. The issue is a matter of substance not heretofore determined by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 17, 1972

(APPENDIX)

Decision and Order of National Labor Relations Board

184 NLRB No. 1

D-4149
Newark, N. J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Cases 22-CA-3879
22-CA-3932

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CAST OPTICS CORPORATION,

and

TEXTILE WORKERS OF AMERICA, AFL-CIO.

———o———

Decision

On March 30, 1970, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the

exceptions, the briefs, and the entire record in this case,[1] and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.[3]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Cast Optics Corporation, Hackensack, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Substitute for paragraph 2(b) of the Trial Examiner's Recommended Order the following:

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[1] As the record, exceptions, and briefs in our opinion adequately present the issues and the positions of the parties, Respondent's request for oral argument is hereby denied.

[2] The Charging Party notes that the Trial Examiner's Decision, in part IV, A, 1, states that Hernandez was discharged May 20 whereas this occurred on May 22. This is an obvious inadvertence which does not affect his conclusion, and we hereby correct that date.

[3] In agreeing with the Trial Examiner that Respondent violated Section 8(a)(5), (3), and (1) of the Act, we deem it unnecessary to pass on the Trial Examiner's finding that the Union instigated and approved the illegal work stoppage which occurred during the period of May 23 through May 26, 1969. Whether or not the Union instigated that stoppage, when Respondent hired back the strikers, they retained their right under the Act to be represented by the Union as their bargaining representative. There is nothing in the record that demonstrates that Respondent had reasonable cause to believe that the strikers had repudiated their bargaining representative, indeed the record, considered as a whole, points to the opposite conclusion. Accordingly, Respondent's withdrawal of recognition from the Union and its refusal to deal with it violated Section 8(a)(5) of the Act.

"Offer to the employees whose names appear on Appendix A attached to the Trial Examiner's Decision immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any individual hired since June 30, 1969."

2. Substitute for the sixth indented paragraph of the "Notice to Employees" the following:

> WE WILL offer to the employees whose names appear on the attached list immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any individual hired since the beginning of the strike on June 30, 1969; and

Dated, Washington, D.C. June 30, 1970

.....
JOHN H. FANNING, Member

.....
GERALD A. BROWN, Member

.....
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Brown would commence the backpay for the striking employees on July 3, 1969, the date on which the Respondent sent to each employee a letter informing him that he was discharged, rather than from October 3, 1969, the date on which the employees unconditionally applied for reinstatement. See his dissent in *Sea-Way Distributing, Inc.*, 143 NLRB 460, 461.

Trial Examiner's Decision

TXD-160-70 Newark, N. J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D. C.

Cases Nos. 22-CA-3879, 22-CA-3932

———o———

CAST OPTICS CORPORATION

AND

TEXTILE WORKERS OF AMERICA, AFL-CIO

———o———

WILLIAM PASCAREL, Esq., of Newark, N. J., for the General Counsel.

JOSEPH N. TAUBER, Esq. and MR. PAUL DADDONA, of Stamford, Conn., and ALLEN BLAKE, Esq., of Norwalk, Conn., for the Respondent.

CORNELIUS COLLINS, JR., Esq., of New York, N. Y., for the Charging Union.

STATEMENT OF THE CASE

THOMAS F. MAHER, Trial Examiner: Upon charges filed on August 14 and October 6, 1969 by Textile Workers of America, AFL-CIO, against Cast Optics Corporation, Respondent herein, the Regional Director for the Twenty-second Region of the National Labor Relations Board, herein

called the Board, issued complaints on behalf of the General Counsel of the Board on September 22 and October 23, 1969 respectively and an Amended Complaint on October 23, 1969, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151 *et seq.*), herein called the Act.

Contemporaneously with the filing of charges in this matter charges were filed in Cases Nos. 22-CB-1535 and 1577-1 and 2 on July 28 and October 6, 1969 respectively, by Cast Optics Corporation, the Respondent herein, against Textile Workers Union of America, AFL-CIO, Passaic-Bergen Joint Board and Local 656, Textile Workers Union, AFL-CIO. A Complaint was issued on September 5, following the filing of the first charge and an Amended Complaint was issued on October 23, 1969. Previously, on September 23, Case No. 22-CB-1535 was consolidated with a Complaint issued on the previous day in the instant case, Case No. 22-CA-3879. Thereafter, on October 23, upon the issuance of an Amended Complaint in the instant proceeding, all cases were consolidated for hearing. At the commencement of the trial of these cases before me Counsel for the General Counsel moved to sever the Amended Complaint against the Union Respondent from the Amended Complaint against Respondent Cast Optics for the reason that a settlement agreement had been executed in Cases Nos. 22-CB-1535, 1577-1 and 2. Upon consideration of the diversity of issues in the cases consolidated for trial, the conflicting interests of the parties joined as Respondents, and my view that an excess of confusion would result I granted Counsel for General Counsel's motion and severed Cases Nos. 22-CB-1535, 1577-1 and 2 over Respondent Cast Optics' objection. I then refused to rule upon General Counsel's motion to withdraw the Amended Complaint in the case which I had ordered severed, ruling that such a request would be proper

only when the case was before me. Upon Respondent's request to the Board for permission to appeal my severance of these cases the Board denied by order of December 4, 1969. Subsequently, on December 8, 1969, I heard the severed Cases No. 22-CB-1535, 1577-1 and 2 and after due consideration of the settlement agreement which the Charging Party, Cast Optics Corporation, had refused to accept, I granted Counsel for General Counsel's motion to withdraw the Complaint. Such rulings as I have made in the severed 22-CB-1535, 1577-1 and 2 I do not consider to be before me as part of the instance case and will make no further reference to them herein.

In the instant case Respondent duly filed its Answer wherein, while admitting certain allegations of the Amended Complaint, it denied the commission of any unfair labor practice.

Pursuant to notice the trial referred to above was held before me on various dates in November and December 1969 in Newark, New Jersey, where all parties were present, represented by counsel, and afforded full opportunity to be heard, present oral argument and file briefs. All parties filed briefs.

Upon consideration of the entire record, including the briefs filed with me, and specifically upon my observation of each witness appearing before me,[1] I make the following:

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[1] I have considered the testimony of all witnesses, including those whose testimony I neither accept nor refer to. In evaluating the testimony of each witness I have relied specifically upon his demeanor and have made my findings accordingly, and while apart from consideration of demeanor, I have taken into account inconsistencies and conflicting evidence, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop and Malco, Inc.*, 157 NLRB 1159, 1161.

Trial Examiner's Decision

Findings of Fact and Conclusions of Law

I. The Business of Respondent

Cast Optics Corporation, Respondent herein, is a New Jersey corporation with its principal office located in Stamford, Connecticut, and a plant located in Hackensack, New Jersey, where it is engaged in the manufacture, sale and distribution of acrylic, plastic sheets, and related products. During the twelve-month period immediately preceding the issuance of the Amended Complaint Respondent manufactured, sold and distributed at its Hackensack plant goods, products and materials valued in excess of $50,000, of which, goods, products and materials valued in excess of $50,000 were shipped in interstate commerce to states of the United States other than the State of New Jersey.

Upon the foregoing facts, stipulated by all parties, I conclude and find the Respondent to be an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is stipulated among the parties and I accordingly conclude and find that Textile Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

1. The employee status of individuals who strike in violation of a no-strike contract provision.

2. The employee status of individuals who strike in violation of the provisions of Section 8(d).

3. The continuing representative status of a union authorizing a strike in violation of Section 8(d).

4. Condonation as an element is assessing the employee status of returning strikers.

5. Unilateral grant of wages and benefits.

6. The nature of an unfair labor practice strike.

7. The obligation to accede to strikers' unconditional request for reinstatement.

IV. The Unfair Labor Practices

A. *Sequence of Events*

Bargaining relations between Cast Optics and the Union have existed for a number of years, the Union being recognized, by the terms of a contract executed November 7, 1966, as the exclusive bargaining representative in a bargaining unit consisting of all Respondent's production and maintenance employees at its Hackensack plant and excluding office employees, salesmen, technical and professional employees, watchmen, guards, foremen and all other supervisors. This I conclude and find to be a unit of Respondent's employees appropriate for the purposes of collective bargaining.

The Company's assets were purchased by the present management from its previous owners on January 2, 1969. Included in this transfer of ownership was the current bargaining agreement referred to above, together with two addenda signed by the parties prior to the transfer date, all of which were thereafter assented to by the parties.

Trial Examiner's Decision

In the course of its development of a new management policy the Company's officials included Paul Daddona, the chief executive officer and the Respondent's principal spokesman at the trial, and B. Edwin Sackett, the newly appointed president whose function appears to have been to organize the operation. Sackett, an industrial consultant, has since resigned his position as president and continues his relation only in a consultive capacity.

1. The May work stoppage

Upon the reorganization of the Company an inventory was taken of its assets and a re-evaluation made of the duties and responsibilities of supervisory and rank-and-file employees. In the course of this study and also based presumably upon unidentified reports the work performance of one Gregorios Hernandez, an inspector in the plant, a member of the Union and secretary-treasurer of its Local 656,[2] became the subject of special attention. As a result it was determined on May 19 that Hernandez be transferred from his job of inspector in the quality control department to inspector in glass department. This transfer was executed on Tuesday, May 20 by Director of Manufacturing Chris Masterson at Daddona's direction. This did not meet with Hernandez' approval and he refused to accept the assignment. It was then decided that on Wednesday, May 21 Hernandez would again be directly assigned his new duties and if he again refused them he would be discharged.[3] He again refused and on May 20,

[2] Local 656 TWU-AFL-CIO, is the local of the Charging Union which services the contract. Its headquarters, located in Union City, New Jersey, are shared with Passaic-Bergen Joint Board, Textile Workers Union of America, AFL-CIO.

[3] The uncontradicted testimony of Paul Daddona. Although for reasons that will be set forth hereafter I do not rely on Daddona's testimony generally, I do accept it of necessity in instances such as this where transactions are peculiarly within his sphere of activity as executive officer of Respondent.

after consultation with Union's business agent, Germinal (Tony) Vargas, and subsequent official notification to him, Hernandez was discharged for the stated reason of "his refusal to obey or carry through orders."

The reaction of the employees, all members of the Union, to Hernandez' discharge was unfavorable.[4] On the following morning the employees reported for work but upon reaching their work stations refused to perform their assigned duties. They were all informed of the disastrous consequences of their refusal to work, with particular reference to the premature hardening of the liquid plastic material, Monomer, used in the manufacture of the Company's product. Nonetheless, all of them adamantly refused to work but remained in the plant. Meanwhile, to avoid the destruction of machinery and equipment which would result from the hardening of unpoured Monomer, the supervisory staff performed the necessary production operations calculated to dispose of the prepared or "cooked" material on hand for the day's production. It appears that there was resulting damage but the record does not reflect its extent.

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[4] The testimony of Respondent's executive director, Paul Daddona, is replete with factual details suggestive of pilferage, collusion and a general aura of unsavory behavior among the employees within the plant, particularly as it affects their relationship with their union during this period. While I rely on Daddona's testimony within the limitations noted above (fn. 3), I do not do so generally, having had full opportunity to observe his demeanor at the hearing, to consider his testimony in full, and to evaluate it against gratuitous remarks and statements he volunteered throughout the hearing. Moreover I have considered his frequent evasions, including a studied effort to avoid identifying the stationery of his own corporation and the signature of his associate, Masterson. I accordingly reject his uncorroborated testimony concerning the widespread misfeasance among the employees, and the inferences of wrongdoing which he attributes to union officials and to public officials, specifically the personnel of the police department of Hackensack, New Jersey, and the staff personnel of the Board's Regional Office.

On the next workday, Monday, May 26, the employees who had engaged in the Friday work stoppage appeared for work at the usual starting time. As the men appeared at the plant entrance each was informed that he would be admitted to work only if he agreed to perform his usual duties; and failing to so perform their duties after having agreed to do so they would be discharged. Only two or three of the plant's 200 employees agreed to work and were admitted. The remainder milled around outside the plant talking to union officials who were present. Meetings were held between representatives of management, employee officials of the Union and Business Agent Vargas for the purpose of returning the men to work, the employees insisting that Hernandez be reinstated and that the certain economic demands submitted to management in early May be met. The Company, however, while seeking to have the men return, rejected their demands as a condition of ending the work stoppage and finally designated Thursday, 7:30 a.m., May 29 as the deadline by which they could return to their work upon agreement to perform all their duties. Failing to conform by this date the employees would be discharged for participating in an illegal work stoppage. All of the employees complied with Respondent's conditions and returned to work before the Thursday deadline.[5]

There is conflicting testimony as to the Union's connection with this work stoppage and as to the inferences to be drawn from the Union's earlier efforts to effect changes in wages, rates and other contract provisions. Because consideration of these elements contribute little

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[5] The foregoing findings concerning the work stoppage is a summarization of the credited testimony of Edwin Sackett. To the extent that union officials have testified to the contrary concerning their knowledge of or participation in these events, I do not credit them. Elsewhere in this decision the Union's responsibility for this stoppage will be considered further. At that time I shall have further comment on the testimony of these individuals.

to a detail of the sequence of events, insofar as they constitute background for the alleged unfair labor practices, I shall refrain from further consideration of the Union's conduct during this period. I shall consider it hereafter in relation to Respondent's defense to the actions which it took (*infra*, p. 9).

2. The exclusion of the Union

Following the employees' abandonment of the work stoppage which Respondent claims to have been of union instigation, a contention which General Counsel and the Union dispute, Respondent took a series of actions which it candidly admits to have been in derogation of the Union's exclusive representative status.

First it was determined by Executive Officer Daddona that upon the men's return there were to be no reprisals taken against any of them in the form of harassment, bad assignments, transfers, or discharge. Furthermore, because of what he considered a complete failure of cooperation and a breakdown of communications, he decided that "he was not dealing with a labor organization in the true sense of the word" and on June 7 resolved that he would no longer recognize the Union as the representative of Respondent's employees. Instead, he determined that henceforth he would deal with them on a "management-employee" basis.

Daddona's determination, as he explains it, was immediately manifest by instructions he gave Respondent's disbursement department on June 9 that the union dues were no longer to be deducted from the employee's paycheck, as provided by the contract, and that no checks were thereafter to be issued to the Union to cover dues or welfare fund payments. As part of the same determination Chris Masterson, the director of manufacturering, was instructed by Daddona to have no further dealings or communications with the Union.

Furthermore, according to Union Representative Frank Cuccio's undenied testimony,[6] not only were the dues not sent to the Union as required by the contract but the payment to the Union's welfare fund, also a contract obligation, were withheld, and no payments have been made since this time. Indeed, when Cuccio sought a meeting with Respondent's management on this matter Gaudio refused him stating that if Tony Vargas, the Union's representative, came onto Respondent's property he would have him arrested for trespassing and concluded the conversation by stating "Frank Cuccio, we don't recognize your union." It also appears that the International's office communicated with the Respondent concerning the delinquent payments but received no reply.

Thereafter, on June 20, the then general manager Gaudio posted on the company bulletin boards and enclosed in each employee's pay envelope a notice reading as follows:

> The new management of Cast Optics is pleased to grant you a $.05 an hour increase.

Gaudio testified that he took this action without consulting with the Union or any of its officials.

Meanwhile, in mid-June, Respondent took personnel action with respect to maintenance employees, firemen and painters, which, it is claimed, was calculated to remove them from the bargaining unit covered by the contract. Thus these people who were by contract paid on an hourly scale were placed on a regular salary. The distinction sought to be drawn here between salaried and hourly employees evaporates upon analysis. Union Representative Cuccio simply testified that the changeover occurred—which it did. General Manager Gaudio testified he did not know if this

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[6] I rely upon Cuccio's testimony only to the extent that it is undenied, is contrary to the Union's interests herein in, or is corroborated by the testimony of credible witnesses.

group of employees were salaried or hourly paid. But Employee Kenneth Pereira, called as a witness by General Counsel, would seem to have scuttled any suggestion of impropriety in the action. He testified that he was in fact notified by Supervisor Joe Ulato that he was being placed on salary basis, that he and the other maintenance people thereafter received a paycheck of a different color from the checks received by hourly-paid employees. This they immediately reported to the Union. The money he received as salary was identical, however, to what he received on the hourly basis, and under both bases of compensation he was paid for the numbers of hours he worked. Speaking for himself Pereira testified he joined the other employees in a strike which followed shortly thereafter. Under the circumstances described by this witness, the only maintenance employee called to testify concerning his alleged change of status, it is doubtful that a meaningful withdrawal of maintenance employees from the bargaining unit was ever accomplished.

3. The protest strike

On June 29 a meeting of the local's membership was called to consider Respondent's actions taken against the Union. By a vote of the membership a strike was called for the following day, June 30, in protest of Respondent's action. The employees struck on the following morning and picket lines were established at the plant gate.[7] Thereafter, on July 3, each striking employee [8] was sent a letter

[7] There is conflicting evidence as to whether the firemen and painters—maintenance employees—joined in the strike. I have already concluded, for lack of adequate proof, that these were not removed from the unit. Their participation in the strike is not a significant fact, particularly in view of a stipulation of the parties to the names of the individuals who did participate and in whose behalf reinstatement was later sought.

[8] A list of these employees appears as Appendix A to this Decision.

by Respondent informing him that he was being discharged. The strike continued as of the date of the hearing. Interim activities on the picket line bear further significance to the issues presented here.

4. The assault on the pickets

On July 23, 1969, during the course of picketing, it appears that 25 or 30 pickets were walking in front of the plant premises on South Newman Street, Hackensack, with a considerable additional number of employees congregated on the opposite side of the street. Patrolman Lewis Canestrino credibly corroborates Employee Ramon Bango's account of an outpouring of workers from the plant, presumably replacements for the strikers, setting upon the pickets with sticks, pieces of plastic and stones, under the amused and watchful eye of Respondent's supervisors. Thus Canestrino testified to what occurred during the afternoon of July 23:

> Well, there were about twenty-five, thirty picketers walking up and down in front of Cast Optics on South Newman Street. On three—on two or three different occasions all the employees of Cast Optics, which for the most part were under twenty, all came out of the building holding pipes and pieces of plastic and, all different objects, two by fours. And they came out and they harassed the picketers by pushing past them and making believe they were picking up garbage and pushing them over. Then they would go back in the building, we would tell them to go back into the building and ten or fifteen minutes later, they would come out again and do the same thing repeatedly over.

He also described two additional incidents occurring on the same afternoon. One involved the pushing of a "dipsy

dumpster''—a garbage container—into the pickets and another was the driving of a forklift down into the crowd. Canestrino could not identify who was responsible for either ''prank'' or who directed it.

I am not disposed to accept Respondent's disavowal of responsibility or even knowledge of the mass altercation described by the patrolman. Specifically I reject as incredible Gaudio's explanation that an anonymous phone message generated a bomb scare at the plant and that after summoning fire department officials management was then instructed to evacuate the employees, thus accounting for the melee when the employees reached the street. Gaudio did not impress me as a reliable witness, engaging as he frequently did throughout his testimony in generalizations and exaggerations when asked specific questions. This and his penchant for avoiding answers by protesting lack of knowledge on subjects a general manager should be expected to know[9] requires me to accept his testimony only when it constitutes an admission against Respondent's interest, or is corroborated by the testimony of credible witnesses. With respect to Employee Bango's account of this incident I reject it as a highly emotional account which did not comport with the accurate testimony of the patrolman. I do accept Bango's testimony as evidence that the event did occur, however, and that an assault on the pickets was perpetrated by the working employees in the presence of company officials and supervisors.

5. Company-established benefits

Finally, in late August Respondent took one final action to seal off its relationship from the Union. Thus a document signed by George Faline, the newly hired personnel

[9] For example, he did not know if maintenance employees were salaried or hourly paid.

manager, was posted at the plant and sent to every employee. Described by Gaudio at the hearing as "a statement for grievances its a statement on hospital coverage that I directed the personnel manager to make. And also holidays," this document consisting of three typed pages was introduced as an outline of company benefits available to all employees after 30 days employment. It contained procedures for hospitalization and medical insurance; it specified the eight paid holidays and the criteria for vacations; and finally, it outlined a multi-step grievance procedure available to the individual employee. Gaudio testified that in promulgating these benefits he did not discuss them with the Union.

6. The striking employees' request for reinstatement

In October the Union called a meeting of all the striking employees and informed them of the futility of the strike so far and the Union's inability to deal with the Company. Thus Business Representative Cuccio testified:

> October we held a meeting of all the strikers and we appraised them of the problem we are faced with and we asked them if they were willing to return to work unconditionally. That would mean without the union, without any rights to grievances, etcetera, and wages or any other issues that may resolve around the contract provisions, and they says we would agree if we asked them to, and I do so accepted a letter to the company offering our people to return to work unconditionally. I think the date of that letter went out around October the third. (Tr. 48)

The letter sent by the Union on October 3, 1969 on behalf of the striking employees requested of the respondent their unconditioned reinstatement, and read as follows:

> Textile Worker's Union of America, the authorized representative of the employees whose names are appended to this letter, hereby, on their behalf, unconditionally offers that they will immediately return to work at their same of (sic) substantially similar jobs.
>
> If you find that there are any mechanical problems incident to their immediate reinstatement, I am available at the above address to meet with you for that purpose.

The list of employees whose reinstatement was requested appears as Appendix A of this Decision. Although respondent admits to receiving the letter, Gaudio, who by that time had become president of Respondent, testified that he did not know whether or not the letter was answered. Cuccio testified, however, that there was no reply. There is no evidence that any striker has been reinstated, the men were still on strike as of the date of the hearing in December 1969, and the pickets were still on active patrol.

B. *The Respondent's Defense*

It is Respondent's position that the actions which it admittedly took in derogation of the Union's claimed majority status and the outstanding agreement were completely justified by the terms of judicial precedent and the provisions of Section 8(d) of the Act.[10] Specifically it is claimed

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[10] The following are portions of Section 8(d) upon which Respondent relies:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation

that by the Union's efforts in early May to obtain certain changes in a contract that was not scheduled to expire until six months thereafter, in November 1969, and by engaging in a strike in violation of an expressed no-strike provision of the contract for the purpose of forcing these concessions, the Union thereby forfeited its representative status and thereby justified Respondent in conducting its affairs with its employees in the manner in which it did, without recourse to or interference from the Union. Implicit in this contention is the more basic one that the May 23-26 strike considered above (*supra*, p. 4) was called at the direction of the Union and for the dual purpose of obtaining contract concessions and procuring the discharged employee Hernandez' statement. And further that the strike was not, as claimed by General Counsel and the Union, an unauthorized or "wildcat" strike engaged in by the employees solely for the purpose of aiding Hernandez.

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does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * *

(4) continues in full force and effect without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employees shall terminate if and when he is reemployed by such employer.

Trial Examiner's Decision

To properly evaluate the Respondent's defense to its refusal to deal with the Union and to its July 3 discharge of the employees who went on strike a second time, (*supra*, p. 7) it becomes necessary to make certain additional findings and conclusions which are not necessarily relevant to the allegations of the complaint, *albeit* they do relate to Respondent's defense, regardless of its ultimate merits. These findings and conclusions follow.

1. The May work stoppage

On May 13, 1969 [11] Tony Vargas of the Union mailed a document entitled "Contract Proposals" to Chris Masterson, Director of Manufacturing, with a letter of transmittal stating:

> Enclosed please find contract proposals for Cast Optics Corp. When you are ready to commence discussions, at your earliest possible convenience, please let us know.

Included among the proposals were substantial wage increases, improvements in vacations, sick pay, and death and holiday benefits, the addition of a dental plan to the existing health benefits and the institution of a profit-sharing plan.

A review of the contract between the parties discloses that Section XXVIII of that document establishes November 7, 1969 as its expiration date and that the only provision for modification is one that permits of such action upon its expiration, following at least 60 days notice of intention. Nothing in the contract permits of modification at any other time or under any other circumstance.

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[11] The letter bore the date of April 13 but Vargas testified that this was a clerical error and it should have been May 13. No one disputes this correction.

Upon the receipt of Vargas' proposals, Masterson, who had dealt with the Union under the previous management, referred the matter to the then president, Edwin Sackett, who thereafter had significant conversations with union officials and representatives.[12]

It will be recalled from earlier findings that a number of meetings were held between management and the Union officials in an effort to get the men back to work (*supra,* p. 5). Sackett represented the Company at these meetings and testified at length concerning them. He also produced notes of what transpired at the meetings which were made contemporaneously with the meetings by a member of his staff and verified by him.[13] Throughout the meetings Vargas protested that it was the men who were protesting the discharge of Hernandez and the negotiation of more favor-

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[12] The account of the transactions between Respondent and the Union during this period is based exclusively upon the testimony of Sackett whom I credit for this purpose.

Vargas testified at length concerning the contract proposals, the discharge of Employee Hernandez, and the subsequent work stoppage which began on May 23. I do not credit him except where he has been corroborated by credible witnesses. A review of his testimony discloses numerous contradictions, unexplained lacks of knowledge of what occurred during the strike, and a continuing effort to evade answering questions put to him. For these reasons and upon my observation of him I do not accept his testimony.

Nor do I accept the testimony of Paul Daddona, Respondent's executive officer, who testified at length concerning events in this area as well as in other respects. Consistent with reasons previously stated (fn. 4) I have relied upon Daddona only to the extent that his testimony constitutes an admission against Respondent's interest herein, or is within his own peculiar knowledge, or where he has been corroborated by credible witnesses.

[13] I accept as a substantially accurate report of these meetings Sackett's testimony and notes, and I reject as unreliable Vargas' testimony of the same incidents, and in particular, I reject his denial that he asked that the contract proposals be considered.

able working conditions, but he agreed that he would urge them to return to work. Indeed at the May 26 meeting Vargas became most specific, not only that the Union did not approve the stoppage, but it was the employees who insisted as a condition of their return that (1) Hernandez be reinstated, (2) that they be "treated with respect and fairness," and (3) that the contract be reopened and the Company discuss the contract proposals submitted by Vargas. Sackett was adamant in his refusal to bargain with the employees, or Vargas, in this manner and informed them that they had to return to work first. He referred them to the grievance procedures of the contract for settling the Hernandez matter and any other complaints they might have, and he informed them that this was not the proper time to negotiate a new contract. That time would be the fall.

Vargas said he would urge the men to return but no one appeared on the following day. Respondent then notified the men that unless they returned and worked by May 29, they would be discharged. Upon Vargas' instructions to them they then abandoned the strike and returned to work.

2. Conclusions concerning the May work stoppage

A reading of the several accounts of the strike of the employees which began when the men refused to work at their places on May 23 persuades me that this was not a spontaneous action on the part of the employees but something promulgated by Union Representative Vargas who then made himself scarce and unavailable to management in its efforts to settle the matter. Vargas in his testimony was much too vague and "uninformed" about the stoppage to give any other impression but that he was manipulating the whole affair. Thus, all witnesses testifying concerning the stoppage place him at the scene on numerous occasions,

telephone calls were made to him and never returned by him, and he was present in meetings with management in its efforts to settle the strike. These appearances of a ranking union official at an explosive labor dispute cannot be equated with the casual bystander, and I refuse to so equate them. Vargas initially made contract proposals, asked at a meeting that they be discussed, and, as the work stoppage drew to a close was the one who stepped in and ordered the men to return. I reject the contention that he was not otherwise involved in the stoppage.

Upon facts less obvious than those presented here the Board has held that a strike may be called "informally in a manner which is understood by the initiated," stating that "the critical question is not *how* the [Union] gave the strike call but *whether*, no matter how they did give it." [14] I accordingly conclude and find that the only reasonable inference to be drawn from all the evidence that I have relied upon is that the strike is one approved by the Union.[15] As the contract under which the Union and Company operated specifically forbids such a strike I find that the work stoppage of May 23-26 was an illegal one and not an activity protected by Section 7 of the Act.[16]

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[14] *Amalgamated Meat Cutters and Butcher Workmen of North America (A.F.L.), Local No. 421 (The Great Atlantic and Pacific Tea Company)*, 81 NLRB 1052, 1057, citing *United States* v. *International Union, United Mine Workers*, 77 F. Supp. 563, 566 (D.C.D.C.), affd. 177 F. 2d 29, 35 (C.A., D.C.), cert. denied 338 U. S. 871, wherein the lower court stated:

> these men, it is contended, did as individuals, what they had a right to do, work or not work, and they decided not to work.
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> Now we have to consider the validity of that claim objectively. If a nod or wink or a code was used in place of the word "strike" there was just as much a strike called as if the word "strike" had been used.

[15] See also: *Deaton Truck Line, Inc.*, 152 NLRB 1531, 1546, enfd. 389 F. 2d 163 (C.A. 5).

[16] N.L.R.B. The *Sands Manufacturing Co.*, 306 U.S. 721.

C. *Analysis of Issues and Ultimate Conclusions*

Basic to the issues presented in this case is the representative status of the Union during the period when Respondent admittedly refused to recognize or bargain with it, and thereafter. Thus, if as Respondent claims, the Union's conduct during and after the May 23-26 strike and its failure to comply with the provisions of Section 8(d) in the presentation of contract demands served to divest it of its representative status, then Respondent's dealings with the employees thereafter would be proper and the employees' strike in protest of their dealings would not be an unfair labor practice strike entitling them to reinstatement.[17]

1. The status of employees engaged in an illegal strike

So that the facts may appear in their proper perspective, certain absolutes must be established. First, the employees have at no time herein lost their employee status. Respondent suggests the contrary in its brief, relying upon the provision of Section 8(d) which states:

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, *but such loss of status for such employees shall terminate if and when he is reemployed by such employer.* (Emphasis supplied)

Clearly what occurred here was condoned by Respondent, Daddona having testified that when the men returned to work by May 29 it was then determined that no reprisals

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[17] *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270.

of any kind would be taken against them (*supra,* p. 6). As such action comports with the Board's established standards of condonation[18] I would conclude and find that within the terms of Section 8(d) quoted above, any jeopardy to the employment status that the employees may have suffered by virtue of the May work stoppage, whether it be a union authorized strike in violation of the contract, as I have found, or a "wildcat" or unauthorized strike as General Counsel and the Union claims, has been vitiated by Respondent's forgiveness.

2. The legality of the May work stoppage

Having thus established that the employees have retained their employee status throughout May and June, it remains to be determined if and when the Union ceased to represent them.

It is true, of course, as Respondent claims, that one of the objectives of the May 23-26 strike which I have found to be union authorized was to force acceptance of the Union's demands submitted on May 13. The evidence of this has been credited (*supra* p. 11). Clearly these demands were not and could not be made in accordance with any reopening or modification provision of the contract. They were, therefore, highly improper. There was no provision in the contract for mid-term modification. Consequently the Section 8(d) requirement that notice of modification be given would apply only to period approaching the November 7 expiration date. Therefore on May 13, by anticipating by four months a demand for modification which Section 8(d) precluded the Union from making,

[18] "Condonation necessarily contains the elements of forgiveness and an intention of treating employees as if their misconduct had not occurred." *Dubo Manufacturing Corporation,* 148 NLRB 1114, 1119.

the Union clearly failed to comply with Section 8(d). But in any event if a modification date prior to expiration could possibly be read into the contract the May 23 strike was still illegal, for it did not, as Section 8(d)(4) requires, provide an interval of sixty days between the notice of modification and the beginning of the strike.

Accordingly, for the reasons discussed above I conclude and find that the demand for or "notice" of modification and the proposals submitted were improper and the strike in support of them clearly violated Section 8(d)(4).

3. The continuing representative status of the Union

In the face of what I have found and concluded to be improper contract demands supported by an illegal work stoppage, the Union's disputed status as representative of the employees now comes into focus. Respondent then and now claims that because of the strike the Union lost its representative status.

By a process of circuitous reasoning which completely baffles me Respondent argues that because the Respondent has violated Section 8(d) by striking for modifications without following its requirements (a conclusion with which I agree) and because employees are divested of their employee status by engaging in such strike (be it authorized or "wildcat"), the Union thereby loses the right to represent them. The argument, as I understood it, places this moment of transition at the time when the strike occurs, the employees' status not being regained until the employee "is reemployed by such employer."[19] Thus, in the period between May 23, the date of the beginning of the work stoppage, and May 27, the date upon which Re-

[19] Section 8(d).

spondent took back the employees "without reprisal," it is claimed that an "instant decertification" of the Union took place.

In support of this distortion I am referred to *Graham v. Boeing Airplane Co.*,[20] a decision of the United States District Court for the Western District of Washington. Therein the court held that because a union failed to observe the contract modification and strike notice procedure required by Section 8(d) the employees who engaged in the strike, were, by the terms of the statute, no longer employees. And accordingly, in the absence of employees to be represented "the statute does not require [the employer] to recognize [the union] as their representative." The reliance upon this decision is misplaced. There, unlike here, the employees remained on strike, even to the date of the court's decision, and it is understandable that those whom the union claimed to represent were not employees by operation of Section 8(d). Here, however, except for a three-day period the employees were at work with the Company's blessing. So unless the decision stands for the narrow proposition that an immediate metamorphosis takes place it has no application here.[21]

I am likewise referred to *Boeing Airplane Co.* v. *N.L.R.B.*,[22] an outgrowth of the dispute which formed the

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[20] 22 LRRM 2243 (1948), 15 *Labor Cases* § 64, 604.

[21] Respondent mistakenly relies upon the testimony of employees that they returned from the strike "not as members of the Union," thus suggesting abandonment of the Union. As the pertinent section of Section 8(d) refers only to the loss or acquisition of employee status, I do not see the relevance of the employees' union membership. Nor am I disposed to view the individual decisions of union members not to remain union members sufficient, of itself, to divest a union of its representative status. Section 9(c)(1)(A)(ii) of the Act provides all of the machinery necessary for such a determination.

[22] 174 F. 2d 988 (C.A.,D.C.).

basis of the earlier *Boeing* case cited above and involving the same striking employees. The court stated (at 991):

> The Company was not guilty of an unfair labor practice in refusing to bargain with the union (after the calling of the strike). The Union had lost its standing as the collective-bargaining agent and the Company was at liberty to treat the employees as having *severed their relations with the Company* because of their breach of contract, and it was further at liberty to consummate their separation from the Company's employ by hiring others to take their place. (Emphasis added.)

In that case, as previously considered, the employees went on strike, as did the employees here, in violation of Section 8(d). But there, *unlike here*, they remained out, and the court simply reiterated the District Court's view that illegal strikers who during their strike lost their employee status were not individuals eligible for representation therefor the offending union lost its representative status. That is not this case. These employees resumed work at the Company's invitation.

Here, unless it is to be held that any breach of Section 8(d), or any strike in violation of its or any "wildcat" strike, however brief, serves to decertify a union, Respondent has no standing to renege on its obligation to recognize and bargain. It would seem that the converse of this proposition would best illustrate its failing. Thus, if we are to say that by the simple expedient of unprotected employee misconduct their bargaining representative's status is placed in jeopardy we are, by such a ruling, providing a most expeditious vehicle for recalcitrant, unscrupulous, or dissident employees, obstinate union officials, or indeed a likeminded employer, to destroy an established bargaining relationship. I know of no law or policy of the Board or decision of the courts that would provide such a disorderly

substitute for the statutory decertification processes. On the contrary, based upon the foregoing facts and considerations, I conclude and find that at all times relevant herein the Union represented the employees of the Respondent.

4. The unlawful rejection of the Union

Premised upon the foregoing conclusions the actions which Respondent took after June 6 are clearly proscribed as being in derrogation of its obligation to bargain with the established bargaining representative of its employees.[23] Thus its positive statement that it no longer recognized the Union conclusively establishes its refusal to bargain. In addition, the unilateral action which it took in raising wages, and its failure and refusal to check off union dues and to remit them and employee welfare payments to the Union are classic examples of refusals to bargain. Upon the foregoing conduct, therefore, I conclude and find that Respondent has refused to bargain with the established bargaining representative of its employees thereby violating Section 8(a)(5) and (1) of the Act.[24]

5. The unfair labor practice strike

A review of the credited findings made above discloses, and no one seriously disputes, that the June 30 strike of

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[23] In the posture of the case wherein I have found the Union to have continued its representative status I find it unnecessary to consider the legal effect of notification to the Union by Respondent, through Masterson, during June of certain discharges that had been effected.

[24] In further defense of its action Respondent sought to establish by absentee records a slowdown campaign in June which it would attribute to the Union. I find it unnecessary to determine if such a condition existed. But if indeed it did exist Respondent's remedy for such improper conduct, either by the employees or by the Union, would not include resort on its part to a violation of the Act.

its employees called by the Union following the June 29 meeting was in protest of the Respondent's stated refusal to bargain; and its accompanying actions which it took to underline that refusal—all of which I have found to constitute unfair labor practices. Such a strike is most certainly an unfair labor strike whose participants are insured unqualified reinstatement by their employer upon their unconditional request for reinstatement.[25] Nor is it significant *at this point in time* that the contract still outstanding, however repudiated by Respondent, contained the very no-strike provision so vital to determinations elsewhere in this matter (*supra,* p. 13). Here, unlike the May 23-26 strike, the employees were striking in protest of employer conduct alleged and found to be violations of the Act. It is well established that employees' right to strike in protest of unfair labor practices is not waived by an contractual agreement to forego "any strike or work stoppage during the term of this Agreement."[26] I accordingly reject the suggestion that the unfair labor practice strike which began on June 30, 1969 was controlled in any manner by the outstanding contract between Respondent and the Union.

Respondent's unfair labor practices having provided adequate grounds for the employees' strike in protest of them, "the striking employees do not lose their status and are entitled to reinstatement with backpay, even if replacements for them have been made."[27] Nor is it of consequence that other causes, economic in nature, also contributed to the calling of the strike, so long as it has

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[25] *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 278; *N.L.R.B.* v. *Kobritz*, 193 F. 2d 8, 16-17 (C.A. 1).

[26] *Mastro Plastics Corp.* v. *N.L.R.B.*, *supra,* at 279-284.

[27] *Supra,* fn. 25.

been established that the unfair labor practices "had partly caused the strike." [28]

6. The unconditional request for reinstatement

As noted above, rights to reinstatement and backpay are fixed upon the strikers' unconditional request to be taken back.[29] As the facts demonstrate the Union, by letter of October 3, 1969, requested unconditionally in their behalf the reinstatement of all of the striking employees, a list of whom was sent to Respondent and a copy of which appears as Appendix A of this Decision. Respondent admits the receipt of this request but its president, Gaudio, had no knowledge of what action was taken with respect to it. There is no evidence of any striker's reinstatement before or since, and the strike still continues. It may thus be presumed that the requests for unconditional reinstatement have been rejected, and I so conclude and find.

Nor am I disposed to place any significance upon Respondent's action of July 3, purporting to discharge its striking employees. Whether the purpose of the attempted discharge letter was to effectively terminate the employees, or was a "tactical maneuver" meant to "intimidate the strikers into returning to work" [30] or that it was merely "applying pressure" [31] is really of no consequence. The status of unfair labor practice strikers has long been held to be absolute and impervious to employer assault.[32] I

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[28] *N.L.R.B.* v. *Samuel J. Korbitz, d/b/a Star Beef Co. supra,* at 16-17 *General Drivers and Helpers, Local 662 (Rice Lake Creamery)* v. *N.L.R.B.,* 302 F. 2d 908 (C.A., D. C.).

[29] *Ibid.*

[30] *Associated Wholesale Grocery of Dallas, Inc.,* 119 NLRB 41, 42.

[31] *Englewood Lumber Co.,* 130 NLRB 394, 396.

[32] *Mastro Plastics Corp.* v. *N.L.R.B., supra.*

accordingly reject the suggestion that these employees have been terminated, and perhaps replaced. On October 3, the date upon which reinstatement was requested in their behalf, each striker's right to immediate reinstatement vested, regardless of whether or not he had been replaced.[33] Having then refused the strikers their jobs Respondent thereby discriminated against them in violation of Section 8(a)(3) and (1) of the Act, and I so conclude and find.

7. The illegal assault on the pickets

One more episode must necessarily be disposed of—the violence on the picket line on July 23 (*supra*, p. 7). The evidence which I have credited discloses that on the afternoon in question a group of replacement employees were loosed upon the strike pickets and other nearby striking employees and that in the process sticks, stones and fisticuffs were thrown about indiscriminately. It is also clear from the evidence that this occurred under the watchful eye, if not the outright approval, of Respondent's officials and supervisors. As no *satisfactory* explanation for this altercation has been supplied me the obvious inference is to be drawn. I therefore conclude and find that Respondent, by permitting its working employees to leave their work stations and attack the strikers *en masse*, thereby sought to harass and intimidate them. Citation of authority is hardly necessary to conclude and find as I do that such conduct on Respondent's part interferes with, restrains and coerces employees in the exercise of rights guaranteed them by the Act, and thereby violated Section 8(a)(1) of the Act. I would also conclude and find that such conduct by Respondent could not but solidify the protest of the

[33] *Park Edge Sheridan Meats, Inc.*, 139 NLRB 748, enf'd. 323 F. 2d 956 (C.A. 2).

striking employees and serve to further encourage their determination to continue their strike.

V. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Company set forth in Section IV, above, occurring in connection with Respondent's operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

I have found that Respondent by numerous acts and statements has interfered with, restrained and coerced its employees, has refused to bargain with their duly selected bargaining representatives, has sought to discharge them for striking in protest of its unlawful conduct, has harassed and coerced them as they continued their protest and has failed and refused to reinstate them to their jobs upon their unconditional request therefor; such conduct being in violation of Sections 8(a)(1), (3) and (5) of the Act. I shall accordingly recommend that it cease and desist therefrom, and because of the gravity of Respondent's conduct shall also recommend that it cease and desist from infringing in any other manner upon the rights of the employees guaranteed by the Act.[34]

I shall also recommend certain affirmative action be taken in order to effectuate the policies of the Act. I shall recommend that Respondent be ordered to continue recognition of the Union as the exclusive bargaining representative of its employees, that it continue in full force and effect the

[34] *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 437.

collective agreement which was in effect in June 1969, the date of the Respondent's refusal to recognize and bargain with the Union, that it continue bargaining collectively with the Union concerning the terms and conditions of any new contract to supercede the existing one,[35] and that if agreement be reached that it embody such agreement in writing, and that in the meantime it be ordered not to vary or abandon such benefits it may have given its employees since the date of its initial refusal to recognize this Union.[36]

I shall recommend that with respect to the employees whom Respondent sought to discharge while they were engaged in a strike in protest of Respondent's unlawful refusal to bargain, and whose names appear as Appendix A of this Decision, that they be offered reinstatement to their former or substantially equivalent positions, without prejudice to seniority or any other rights and privileges, terminating if necessary, any person hired since June 30, 1969, the date upon which the unfair labor practice strike began, to make room for them,[37] and that they be made whole from October 3, 1969, the date on which unconditional request for reinstatement was made in their behalf.[38] The backpay to which they are entitled shall be computed in the customary manner, with interest at six percent per annum.[39] It will also be recommended that Respondent post appropriate notice of compliance with the Board Order

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[35] *Tidewater Express Lines, Inc.*, 142 NLRB 1111, 1122.

[36] *The Bassick Co.*, 127 NLRB 1552.

[37] *Hock and Mandel Jewelers*, 145 NLRB 435, 444.

[38] *N.L.R.B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333, 346, *Mastro Plastics Corp.* v. *N.L.R.B.*, *supra*.

[39] *F. W. Woolworth Co.*, 90 NLRB 289.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend,[40] that Case Optics Corporation, Respondent herein, its officers, successors and assigns, shall:

1. Cease and desist from:

(a) Unlawfully harassing, assaulting and otherwise restraining and coercing its employees while they are engaged in concerted activities protected by the Act.

(b) Discouraging membership in Textile Workers of America, AFL-CIO, or in any of its subsidiary or component organizations or in any other labor organization by terminating the employment of their employees and thereafter refusing their unconditional request for reinstatement because they have engaged in the aforementioned concerted activities.

(c) Refusing to bargain with Textile Workers of America, AFL-CIO, as the exclusive bargaining representative of its production and maintenance empoyees, by withdrawing its recognition of said Union, by the withholding of dues and welfare payments for employees as required by contractual obligation and by unilaterally granting employees wage increases and related benefits.

(d) In any other manner interfering with, restraining or coercing its employees, or unlawfully discriminating against them in the exercise of rights guaranteed them by Section 7 of the Act.

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[40] In the event that this Recommended Order is adopted by the Board, the words "RECOMMENDED" shall be deleted from its caption and wherever else it thereafter appears, and for the words "I recommend" there shall be substituted, "the National Labor Relations Board hereby orders."

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer reinstatement to the employees whom it terminated and to whom it thereafter failed and refused to reinstate upon their unconditioned request, dismissing, if necessary, any individual hired since June 30, 1969; said employees to be offered reinstatement being those whose names appear on Appendix A attached to this Decision and Recommended Order.

(b) Make whole the aforesaid striking employees for the period from October 3, 1969 until the date of Respondent's offer of reinstatement, to be computed in the manner set forth in "the Remedy."

(c) Continue to recognize Textile Workers Union of America, AFL-CIO as the exclusive bargaining representative of all its production and maintenance employees as designated in the contract most recently in force.

(d) Upon request, continue to bargain collectively with the aforesaid union concerning the wages and working conditions of its employees and if an understanding is reached, embody such understanding in a new signed agreement.

(e) Continue in full force and effect such benefits and emoluments as it may have granted its employees during the period of its unfair labor practices and the pendancy of these proceedings.

(f) Post at its Hackensack, New Jersey, plant the notice attached hereto as Appendix B.[41] Copies of said notice, on

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[41] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall

forms provided by the Regional Director for the Twenty-second Region shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for the Twenty-second Region, in writing, within 20 days from the receipt of the Trial Examiner's Decision, what steps it has taken to comply therewith.[42]

Dated at Washington, D.C.

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THOMAS F. MAHER
Trial Examiner

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be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[42] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the respective Respondent has taken to comply herewith."

Opinion of Court of Appeals

(Filed March 23, 1972)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1098

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CAST OPTICS CORPORATION,
Respondent.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued November 11, 1971

Before VAN DUSEN and ROSEN, *Circuit Judges* and BECKER, *District Judge*

* BECKER, *District Judge*.

I.

This case is before the Court on the application of the National Labor Relations Board ("Board") pursuant to

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* Sitting by designation.

Section 10(e) of the National Labor Relations Act ("Act")[1] for enforcement of its order issued on June 30, 1970 against Cast Optics Corporation ("Company"), a Hackensack, N. J. concern which is engaged in the manufacture of acrylics, plastic sheets and related products.[2] The case arises out of a bitter labor dispute between the Company and Local 656, Textile Workers Union of America, AFL-CIO ("Union"), the exclusive bargaining representative of the Company's employees.[3] The dispute evolved over a period of several months in four successive stages: *first* a concededly illegal work stoppage which was terminated by the workers' return; *second,* a period during which the Company refused to recognize and bargain with the Union; *third,* a further work stoppage by the men in protest of the Company's refusal to recognize the Union, resulting in the discharge of the strikers; and *fourth,* an unconditional offer by the strikers to return to work, but with a subsequent refusal by the Company to reinstate them.

The Board's findings were threefold in character: *first,* that the Company violated sections 8(a) (1) and (5) of the Act by refusing to recognize and bargain with the Union after the Union members returned to their jobs following the (first stage) illegal work stoppage; *second,* that the Company violated sections 8(a) (1) and (3) of the Act (i) by discharging employees who struck in protest of the Company's refusal to recognize the Union, and (ii) by refusing

[1] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*

[2] The Board's decision and order is reported at 184 NLRB No. 1.

[3] On November 7, 1966, the Company recognized the Union as the exclusive bargaining representative of its production and maintenance employees. The Company and the Union thereupon executed a collective bargaining agreement which remained in force when ownership of the Company was transferred on January 2, 1969. The agreement contained two provisions germane to this action: (1) a no-strike clause and (2) a clause stating that the contract would expire on November 7, 1969, but allowing for modification following 60 days' notice of intention if delivered prior to that date.

to reinstate the unfair labor practice strikers when they unconditionally offered to return to work; and *third* that the Company violated section 8(a) (1) of the Act by permitting nonstriking employees to assault the unfair labor practice strikers (during the third stage of the dispute). The Board's accompanying order requires the Company to cease and desist from the unfair labor practices, offer reinstatement and backpay to the striking employees whom it discharged and whom it failed and refused to reinstate upon their unconditional request, recognize and bargain (upon request) with the Union, continue in full force such benefits as it may have granted the employees after June 6, 1969, and post the appropriate notice.

The ultimate question before us, of course, is whether the Board's findings are supported by substantial evidence. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. However, in this particular appeal, with minor exception, the facts upon which the Board's order is based have not been questioned by the Company.[4] The Company's principal contention is that its reinstatement of the workers who had, admittedly, been stripped of their protection against discharge afforded by §7 of the Act following the stage one illegal work stoppage [5] was a conditional act of condonation which was abrogated by the absenteeism and slowdown tactics of the workers after their return to work, and that this resulted in "instant decertification" of the Union which justified the Company's refusal to bargain with the Union and to reinstate the workers after the subsequent walkout. Accordingly, the main thrust of the Company's attack upon

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[4] The only serious dispute concerned the testimony about the assault of the pickets, but the Trial Examiner discredited the Company's version.

[5] *See*, N.L.R.B. v. Sands Mfg. Co., 306 U.S. 332 (1939); United Furniture Workers of America, Local 270 v. N.L.R.B. 336, F. 2d 738 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 838 (1964); Boeing Airplane Co. v. N.L.R.B., 174 F. 2d 988 (D.C. Cir. 1949); N.L.R.B. v. Dorsey Trailers, Inc., 179 F. 2d 589 (5th Cir. 1950).

the Board's order is based not upon the Board's findings, but upon its *failure* to make findings with respect to the conduct of the workers after the (stage one) work stoppage.[6]

We all first recite the relevant facts supporting the Board's order, and examine the record in the area of the claimed abrogation of condonation (for, even in the absence of findings, there are record facts). We will then turn to an assessment of the validity of the Company's condonation theory. Since we find that, on this record, the theory cannot prevail, we will ultimately reach the question of whether the Board's findings are supported by substantial evidence and, concluding that they are, will grant the requested enforcement order.

II.

The events precipitating the first stage of the dispute began on May 20, 1969 when Chris Masterson ("Masterson"), the Company's director of manufacturing, at the direction of Paul Daddona ("Daddona"), the Company's chief executive officer, transferred an employee named Gregorios Hernandez[7] ("Hernandez") from his job as

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[6] The Examiner found it unnecessary to make such findings: "In further defense of its action Respondent sought to establish by absentee records a slowdown campaign in June which it would attribute to the Union. *I find it unnecessary to determine if such a condition existed.* But if indeed it did exist Respondent's remedy for such improper conduct, either by the employees or by the Union, would not include resort on its part to a violation of the Act." Appendix, p. 22, n. 24.

[7] During the early part of 1969, the management was engaged in taking inventory and a re-evaluation of the duties and responsibilities of both the supervisory and rank-and-file employees. This study allegedly revealed inadequate performance by Hernandez.

inspector in quality control to an inspector in the glass department. Hernandez refused to accept reassignment, and, on May 22, he was discharged for "his refusal to obey or carry through orders." The following morning, Friday, May 23, the other employees reported for work but refused to perform their assigned duties, despite warnings by supervisory personnel that their refusal would lead to the hardening of large quantities of liquid plastic and result in substantial damage to the material and plant equipment. The Company's supervisory personnel thereupon disposed of as much of the material as they could to avoid damage.[8]

On the next workday, Monday, May 26, the employees again reported for work but were met at the plant entrance by supervisory personnel who stated that no employee would be admitted inside the plant unless he agreed to perform his duties in a normal manner, and that if he entered after having agreed to do so and failed to perform normally, he would be immediately discharged. On those conditions, only two or three employees entered the plant while the

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[8] In the manufacture of its products, the Company uses a liquid acrylic substance known as Monomer, which is first cooked or made into "syrup" and then poured into glass molds. It is from the glass molds that the acrylic sheets are cast. After being cooked, the Monomer has to be poured when ready because, if not poured on schedule, it hardens and can freeze the equipment causing damage to the cooking, loading, unloading and glass mold system, with a possible attendant safety hazard. Daddona testified that, on May 23, approximately 120,000 pounds of Monomer had been cooked and drawn into the plant, and that the supervisory personnel tried to avoid destruction of machinery and equipment resulting from the hardening of the unpoured Monomer by disposing of the Monomer, but were unable ot take care of all of it. He estimated that the Company suffered damage in the amount of $643,000. A civil suit by Cast Optics seeking $2,000,000 damages from the Union for the strike commencing on May 23 is presently pending in the United States District Court for the District of New Jersey, Docket No. 1242-70.

rest of the employees milled around outside of the plant talking to Union representatives. Later that day meetings were held between management, employees and officials of the Union, including the Union's business agent, Tony Vargas ("Vargas"). The Union representatives insisted that Hernandez be reinstated and also that the Company agree to certain demands which had been submitted to the Company earlier in May [9] by Vargas. However, the Company rejected these demands as a condition of ending the strike on the grounds that the contract provided grievance procedures to settle the Hernandez affair and that the proper time to renegotiate the contract was in the fall. The Company claims that these demands were a violation of §8(d) of the Act.[10]

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[9] On May 13, 1969, almost six months in advance of the contract's expiration date, Tony Vargas, the Union's business agent, mailed a list of contract proposals relating to increases in wages and other fringe benefits to Masterson; an accompanying letter requested Masterson to commence the necessary discussions as soon as possible.

[10] Section 8(d) provides in pertinent part:

> "[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to a contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof. . . .
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes

After the Company's position was made known, Vargas agreed to urge the men to return to work but no one appeared on the following day. The Company officials thereupon notified the workers that Thursday, May 29, 1969 at 7:30 a.m. was the deadline for the men to return to their jobs and perform their duties; the Company officials declared that a failure to comply by that time would result in the discharge of those employees who continued to participate in the strike. Faced with this ultimatum, the employees abandoned the strike and returned to work. On May 29, 1969, the day that the employees returned to work, Daddona instructed Masterson "that any of the men that came back to work, there were to be no reprisals taken against them, there were to be no discharges, there was to be no harassment of anyone."

The parties agreed not only that the events which we have described constituted an illegal work stoppage, but also that the Company need not have reinstated the men.[11] It follows that, when the Company accepted them back, and Daddona made his "no reprisal" statement to Masterson, their previous conduct had been condoned. We shall discuss the incidents of this condonation, about which there is sharp dispute, *infra*.

Shortly after the men returned to work, Daddona decided that the management would no longer recognize the Union as the representative of the employees. On June 9, Daddona instructed Masterson and Arthur Gaudio, the General Manager of the Company, to have no further communications or dealings with the Union, and on the same date he told the Company's disbursing department not to

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of sections 8, 9, and 10 of the Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

[11] Authority for this proposition is found at n. 5, *supra*.

deduct dues from the employees' wages or to issue checks to the Union to cover dues or welfare fund payments even though they were obligations provided for in the contract with the Union. Throughout the month of June, the management refused to deal with the Union, and on June 20, the Company granted a $.05 an hour increase to the employees.

On June 29, at a meeting called by the Union, the employees voted to strike in protest of the Company's actions against the Union. The strike began the next day when picket lines were established at the plant gate. The Company responded on July 3 by sending a letter to each of the striking employees informing him that he was discharged. Undaunted, the strikers remained at their picket lines.

On July 23, during the course of picketing, 25 or 30 pickets were walking in front of the plant premises, and a considerable number of other striking employees were grouped on the other side of the street. On two or three different occasions on that day, about twenty of the non-striking employees (presumably replacements for the strikers) rushed out of the plant, armed with pipes, pieces of plastic and two-by-fours. Using these weapons, the non-striking employees assaulted the pickets in the unobstructed presence of the Company's supervisors. That afternoon, an unidentified individual pushed a "dipsy dumpster" (a garbage container) into the pickets while another drove a forklift into their midst. The Trial Examiner discredited the Company's version of the incidents, and, lacking a satisfactory explanation of the altercation, found that the apparent approval by the Company amounted to intimidation and harassment of the strikers. (The Board affirmed these conclusions.)

In late August, the Company announced new employee benefits relating to hospitalization and medical insurance,

a specification of holidays, criteria for vacations and an outline of a multi-step grievance procedure. In early October, the Union called another meeting of its members and advised them of the futility of the strike and of the Union's inability to deal with the Company. The striking employees then agreed to return to work, and on October 3, the Union sent a letter to the Company, stating that the Union, on behalf of the striking employees, unconditionally offered to return immediately to their jobs. The Company, however, did not respond to the letter and did not reinstate any of the strikers.

The foregoing facts are all amply supported by the record.

III.

As we have indicated above, even though the Board made no findings with respect to the events occurring after the men were reinstated following the (stage one) illegal work stoppage, there is evidence in the record concerning the matter. That evidence came principally from Daddona, and related to alleged deliberate absenteeism and slowdown. We will review this evidence briefly, not for purposes of making our own finding to fill the vacuum, but to further our analysis of the case and aid in consideration of the appropriateness of remand to the Board.[12]

Daddona testified that he had been told by the workers after their May 29th return that many of them had come to work in cars driven by people who were friendly with the Union's officials, and that they had to pay substantial monies to be transported from different parts of the area

[12] As an alternative to reversal, the Company has suggested that we remand the case to the Board with directions that it make findings in this area. *See*, n. 16, *infra*.

to get to work. Daddona thereupon "came to the conclusion" that these men were forced to ride to work in the cars from which the members of the union were personally profiting. Appendix, 104. When Daddona asked these men why they were absent, "they said that the car that they ride to work in had not come to pick them up to bring them to work." *Id.* at 104-05. Daddona also testified about the percentage of employees who were actually absent during the first week in June—fourteen percent were absent on the first day of that week, and the percentage decreased on each subsequent day of the week.[13]

The testimony of Daddona about the alleged slowdown is even less concrete and substantial. In essence, it is comprised of bare assertions by Daddona that he felt that a slowdown was taking place, principally by the forklift truck operators. As an example, Daddona asserted that they, over an unspecified period of time, would pile materials on top of other material in violation of orders so as to cause delay and confusion in the movement of goods. The remainder of Daddona's testimony on the specifics of his slowdown charge was confusing and unintelligible. The Trial Examiner received in evidence all testimony relevant to the Company's defense, but the Company made no effort to corroborate Daddona's testimony with respect to the

[13] The following list is the actual number of absentees in June 1969 as compared with a week in the preceding month. The numerator represents the number of absentees and the denominator represents the total number of employees on that day. The figures are extracted from the testimony of Daddona (Appendix 118-19) who had compiled them from the business records of the Company.

May 5-3/197-Mon.-June 2-25/183
May 6-1/193-Tues.-June 3-21/184
May 7-3/193-Wed.-June 4-19/184
May 8-2/186-Thur.-June 5-19/187
May 9-2/191-Fri.-June 6-17/188

There was no testimony that the alleged excessive absenteeism continued beyond June 6.

absenteeism and slowdown, and chose to rest on Daddona's testimony alone. While, as we have seen, the Trial Examiner found it unnecessary to make findings with respect to this aspect of the testimony, he did make an observation about Daddona's testimony in general:

> "Although for reasons that will be set forth hereafter I do not rely on Daddona's testimony generally, I do accept it of necessity in instances such as this where transactions are peculiarly within his sphere of activity as executive officer of Respondent.
>
> While I rely on Daddona's testimony within the limitations noted above . . . I do not do so generally, having had full opportunity to observe his demeanor at the hearing, to consider his testimony in full, and to evaluate it against gratuitous remarks and statements he volunteered throughout the hearing [*sic*]. Moreover I have considered his frequent evasions, including a studied effort to avoid identifying the stationery of his own corporation and the signature of his associate, Masterson. I accordingly reject his uncorroborated testimony concerning the widespread misfeasance among the employees, and the inferences of wrongdoing which he attributes to union officials and to public officials, specifically the personnel of the police department of Hackensack, New Jersey, and the staff personnel of the Board's Regional Office." Appendix 203, n. 3, 4.

Accordingly, it would seem clear that the Trial Examiner would not have credited the absenteeism and slowdown testimony in a formal finding, had he elected to make one on the subject.

Daddona stated that his decision not to recognize the Union was based on his ultimate conclusion that he was not dealing with a "responsible" labor organization, which

conclusion was motivated by several factors: (1) his feeling that the May strike was instigated by the Union; (2) the June slowdown and absenteeism; (3) the Union's failure to process employees' meritorious grievances; and (4) his feeling that "the Presidnet [*sic*], Vice President and Secretary of this Union were involved in a concerted effort to steal material from this plant and to sell it for profits that they did something with." Appendix, 103.

IV.

There is no dispute about the fact that when the Company took the workers back on May 29, it thereby condoned their having engaged in an illegal work stoppage which had stripped them of their protection against discharge under the Act. The Company has asked us to resolve the case in its favor or remand it for further findings on the basis of its interpretation of the principle of condonation.

In its conventional form, condonation takes place when the employer demonstrates a "willingness to forgive the improper aspect of concerted action, to 'wipe the slate clean.'" *Confectionery & Tobacco Drivers Union, Local 805* v. *N.L.R.B.*, 312 F. 2d 108, 113 (2d Cir. 1963).[14] The Board contends in its brief that condonation occurred and was complete when the Company waived its privilege of discharging the strikers and accepted them back on a "no reprisal" basis. At oral argument, the Board, advancing its interpretation of the condonation principle, asserted that subsequent conduct of the employees does not and cannot

[14] *See, also,* Stewart Die Casting Corp. v. N.L.R.B., 114 F. 2d 849 (7th Cir. 1940), *cert. denied* 312 U.S. 680 (1940); N.L.R.B. v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (5th Cir. 1955); Packers Hide Ass'n. Inc. v. N.L.R.B., 360 F. 2d 59 (8th Cir. 1966); N.L.R.B. v. Wallick & Schwalm Co., 198 F.2d 477 (3d Cir. 1952); N.L.R.B. v. Community Motor Bus Co., 439 F.2d 965 (4th Cir. 1971).

under the law abrogate or vitiate a condonation so as to authorize reprisals by the Company against the employees or the Union. The Company, on the other hand, argues that condonation takes into account more than just the employer's acts of forgiveness; it urges that post-reinstatement activities by the employees should be considered in determining whether condonation has occurred. In essence, the Company submits that the condonation transaction is akin to a contract in that the employer promises that he will not discipline or discharge the illegal strikers in exchange for and on the condition that the employees, on their part, impliedly promise to resume their normal working relationship within the plant. Alternatively, the Company argues that even if condonation is complete at the time that the illegal strikers return to work, further disruptive acts by the employees after their return to work vitiates the condonation and returns the workers to their unprotected status. Principal support for the Company's position is found in *Poloron Products of Indiana*, 177 NLRB No. 54 (1969), which is similar in some respects to the case at bar.[15]

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[15] In *Poloron*, there was a wildcat strike and picketing for one afternoon, but all of the men went back to work the next day after the employer had promised no reprisals. Two weeks later there was another walkout related in cause to the first. Those who had participated in both walkouts were discharged while those who had participated only in the second walkout were suspended for the balance of the week. In upholding the discharges, the Board stated:

> "In the instant case, however, the subsequent offense was a repetition of the very activity which had originaly been condoned. As the Company puts the matter in its brief, the employees were reinstated after the first walkout with the implicit understanding that they would remain at work, and their subsequent walkout less than 3 weeks later, and for a related cause, constituted a breach by them of their part of the 'condonation' agreement." *Poloron Products, supra.*

Support for the Company's position is also found in N.L.R.B. v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (5th Cir. 1955), wherein the court stated:

> "We think respondent correctly asserts the essential elements of condonation, i.e., forgiveness and *the resumption of the*

The gravamen of the Company's position on appeal is that the absenteeism and slowdown during the first week in June were sufficiently disruptive acts to abrogate or vitiate the condonation effected when the Company accepted the strikers back on May 29, so as to return the employees to their previously unprotected status created by their illegal strike. The Company further submits that, since the workers had lost their status as employees, the Union was no longer the bargaining representative of the workers because the Union had no employees to represent. Therefore, the argument continues, there has been an "instant decertification," as it were, and the Company is not required by the Act to bargain with a Union that has lost its representative status. On this latter point, the Company relies upon *Graham* v. *Boeing Airplane Co.*, 22 LRRM 2243 (1948), 15 Labor Cases ¶64, 604 (1948) and *Boeing Airplane Co.* v. *N.L.R.B.*, 174 F. 2d 988 (D.C. Cir. 1949).

The condonation principle rests upon "a clear public interest in the prompt settlement of labor disputes," *Confectionary & Tobacco Drivers Union, Local 805* v. *N.L.R.B.*, *supra* at 113, and, as a general matter, it does not appear to us that the expectation of a normal day's work in exchange for the employer's waiving of its right to discharge the employees is a subversion of the purposes of condonation or the overall policies of the Act. However, we need not and do not decide whether the condonation principle as advanced by the Company is the law of this circuit. First of all, it appears from our review of the record that, had the Examiner adopted the Company's theory of condonation in full panoply, and therefore deemed it necessary to make

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former relationship between the strikers and respondent. . . ." Id. at 414 [emphasis added].

Likewise, in N.L.R.B. v. Community Motor Bus Co., 439 F.2d 965 (4th Cir. 1971) the court spoke in contractual terms.

a finding as to whether the "absenteeism and slowdown" negated or vitiated the condonation, he would, by virtue of the inadequacy of the testimony on the subject and his rejection of Daddona's credibility have been bound to find that it did not.[16] In addition, however, even assuming: (1) the validity of the Company's view of the condonation; and (2) that a slowdown and absenteeism did occur during the week following the return to work, the Company's actions cannot be upheld. At that juncture, the crucial issue becomes whether the Company acted lawfully in refusing to recognize and bargain with the Union after June 6. However, the *Graham* and *Boeing* cases, cited by the Company as being controlling if we were to adopt its view that the condonation was vitiated, do not make out its case.

The *Graham* and *Boeing* cases stand for the proposition that if an entire plant (or presumably a substantial majority of the employees) engages in a strike in violation of § 8(d), the workers lose their status as employees pursuant to § 8(d) of the Act. In such a situation, the Union has no employees to represent, and the Company's refusal to bargain with the Union is not a violation of § 8(a)(5). Such is not the situation here. It is true that in May, more than sixty days in advance of the termination date of the contract, Vargas had made demands for contract modifications which were one of the precipitating factors of the strike that followed. However, the record also indicates that the discharge of Hernandez may have been a cause.

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[16] In its brief, the Company has argued that we should remand the case to the Board in order for it to make findings from the record concerning the absenteeism and slowdown. We have given the Company the benefit of Daddona's testimony on these matters. Notwithstanding it, the only findings that could be supported by substantial evidence would be insufficient, under our analysis, to allow the Company to refuse to bargain with the Union. Therefore, the failure to make findings is harmless.

In any event, when all of the Company's employees who had engaged in the illegal work stoppage of May 23-29 returned to work, they regained their status as employees [17] and, likewise, the Union regained its position as the bargaining representative of the employees. Thus, on May 29, both the Union and the workers were entitled to the protection of the Act.

There are other reasons why *Graham* and *Boeing* do not apply. The post May 29 absenteeism was, as we have seen, confined to a small percentage of the Company's employees, and it is not known how much the absenteeism was substantially above normal. Moreover, the number or identity of employees involved in the "slowdown" was not established either. It is fundamental that "[t]he acts of some of the strikers cannot be imputed to all. Republic Steel Corp. v. N.L.R.B., 3 Cir., 1929, 107 F.2d 472; § 6 of the Norris-La Guardia Act, 47 Stat. 71, 29 U.S.C.A. § 106." *N.L.R.B.* v. *Wallick,* 198 F.2d 477, 485 n. 10 (3d Cir. 1952). Furthermore, as the Board has pointed out, under the collective bargaining agreement between the parties, the individual acts of the employees are not chargeable to the Union.[18]

There is then a difference between a loss of status as employees and a loss of status as a Union. The Company did not show the extent of the absenteeism and slowdown and the Union's responsibility for and involvement in that

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[17] *See,* n. 10, *supra.*

[18] Section 9A of the collective bargaining agreement stated that "a strike, slowdown or stoppage of work not expressly authorized or ratified in writing by the General President of the Union . . . shall be deemed for all purposes, an unauthorized strike, in which event there shall be no liability on the part of the Union. . . ." Furthermore, Section 9E states that "the sole recourse and exclusive remedy of the Employer in the event of an unauthorized strike, shall be the right to discharge employees. . . ."

conduct. Therefore, under the assumed theory of condonation, only those workers who actually participated in the slowdown would lose their status as employees via Section 8(d).[19] and the underlying rationale of *Graham* and Boeing, *i.e.*, that where all the workers in a company lose their status as employees, the Union has lost its majority, is not applicable.

There is still another basis for the failure of the Company's argument. This Court has recently held that a presumption of majority status of a Union exists and "an employer may refuse to bargain without violating the Act 'if but only if, he in good faith has a reasonable doubt of the Union's continuing majority, [citations omitted] . . . An employer must, however, come forward with evidence casting 'serious doubt on the Union's majority status.'" *N.L.R.B.* v. *Frick Company*, 423 F. 2d 1327 (3d Cir. 1970).

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[19] *Graham* and *Boeing* call into question a point which was not raised on appeal: whether the employees in this case (allegedly) lost their status as employees automatically by operation of § 8(d) or whether the employer must have performed some affirmative act to cause an employee to lose his status as an employee. *N.L.R.B.* v. *Wallick*, 198 F. 477 (3d Cir. 1952) (interpreting § 2(3) of the Act).

If we assume the post-reinstatement conduct by the workers amounted to a strike, and further assume that the objective of that conduct was to force a modification of the contract (there are no findings on these points, and the record indicates contra), then the language of § 8(d) would indicate that the loss of status is automatic. However, the Company's argument would fail in spite of this mechanical approach for the reasons stated in the accompanying text. If other reasons, such as Hernandez' transfer, were the objective of the post-reinstatement conduct, then *Wallick* would require some affirmative act by the employer, such as discharging the offenders, before they lose their status as employees. The Company theory would also fail on this basis because the record reveals that the Company continued to treat the offenders as employees at all times.

The record is utterly devoid of any evidence to support a finding that any Company official entertained a good faith doubt about the majority status of the Union; the evidence points to the contrary.

V.

Having reviewed the Company's theory of condonation, we have found that, even assuming the validity of the theory, the Company was not, on the facts of this record, justified in refusing to recognize and bargain with the Union. Needless to say, if the Company's theory of condonation is invalid, the result is the same. Accordingly, we state at this juncture what is implicit in our earlier observation that the facts before the Board were essentially undisputed, *i.e.*, that the Board's finding that the Company committed an unfair labor practice by refusing to recognize and bargain with the Union after May 29 is supported by substantial evidence, and we affirm that finding.

It follows from the foregoing that the strike which began on June 30 may properly be classified as an unfair labor practice strike for "if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike." *General Drivers & Helpers Union, Local 662* v. *N.L.R.B.*, 302 F. 2d 908, 911 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (1962) and cases cited therein. *Accord*, *N.L.R.B.* v. *Call, Burnup & Sims, Inc.*, 393 F. 2d 412 (1st Cir. 1968); *San Antonio Machine & Supply Corp.* v. *N.L.R.B.*, 363 F. 2d 633 (5th Cir. 1966). The law is settled that workers who participate in an unfair labor practice strike do not lose their status as employees and are entitled to full reinstatement upon an unconditional offer to return to work even if replacements have been hired. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956); *N.L.R.B. v. Clearfield Cheese Co.*, 213 F.2d 70 (3d Cir. 1954); *N.L.R.B.*

v. *Milco, Inc.*, 388 F. 2d 133 (2d Cir. 1968). The unfair labor practice strike of June 30 is protected by the Act, notwithstanding Section 8(d)(4) of the Act and the no-strike provision of the contract. *Mastro Plastics Corp.* v. *N.L.R.B., supra; N.L.R.B.* v. *Buitoni Foods Corp.*, 298 F. 2d 169 (3d Cir. 1962). Therefore, the discharge of the striking employees on July 3 by the Company and its subsequent refusal to reinstate them after their unconditional offer to return on October 3 was a violation of Sections 8(a)(1) and (3) of the Act, and the Board's finding to that effect is supported by substantial evidence.

Finally, we affirm the Board's finding, which is also supported by substantial evidence, that the apparent acquiescence of the Company's officials in the mass egress and assault on the striking employees amounted to conduct not protected by the Act. *N.L.R.B.* v. *Dorsey Trailers, Inc.*, 179 F. 2d 589 (5th Cir. 1950); *N.L.R.B.* v. *Fred P. Weissman Co.*, 170 F.2d 592 (6th Cir. 1948), *cert. denied*, 336 U.S. 972 (1948). *See also, Brewton Fashions, Inc.* v. *N.L.R.B.*, 361 F.2d 8 (5th Cir. 1966), *cert. denied*, 385 U.S. 842 (1966); *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780 (9th Cir. 1940), *cert. denied*, 312 U.S. 678 (1940).

The order of the Board will be enforced.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1098

—o—

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CAST OPTICS CORPORATION,
Respondent,

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

—o—

Before:

VAN DUSEN and ROSEN, *Circuit Judges* and
BECKER, *District Judge.*

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Cast Optics Corporation, its officers, agents, successors, and assigns, on June 30, 1970. The Court heard argument of respective counsel on November 11, 1971, and has considered the briefs and transcript of record filed in this cause. On March 23, 1972, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

Judgment of the Court of Appeals

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced and that Cast Optics Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said Order contained.

It is Further Ordered that costs shall be taxed against the Respondent.

By the Court

Francis L. Van Dusen
Circuit Judge

Dated: April 20, 1972.

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1098

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CAST OPTICS CORPORATION,
Respondent,

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

The Respondent petitions for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reasons that:

A. In concluding that the Union regained its status as bargaining representative of the employees, the Court failed to note that, as set forth in the Company's Brief (pp. 6, 16), the Union's untimely and illegal economic demands were again urged upon the Company immediately after the illegal strike of May 26-29, 1969.

The record is clear that Mr. Cuccio, the Union's joint board manager, who serviced, negotiated and arbitrated for the local union (A. 5) continued during the first week in June to press the Union's admittedly illegal demands under 8(d) for changes in the collective bargaining agreement.

According to Mr. Sackett, President of the Company, whose credibility was repeatedly upheld by the Trial Examiner (A. 204; 214), Mr. Cuccio said to him . . . "I want to talk about everything, the wages and everything else." Further, ... "I, [Sackett] asked him [Cuccio] what he wanted to meet on and he said he wanted to meet on everything, the wage demands and the opening of the contract, and everything else. He wanted to discuss all of it."

In corroboration, Mr. Daddona testified that Mr. Sackett had advised him of the insistence of Mr. Cuccio on the Union's illegal wage demands. At A. 116 Mr. Daddona noted that "[d]uring that week [the first week in June 1969] I received a call from Mr. Sackett. He had received a call from Mr. Cuccio and Mr. Cuccio had again indicated that he wanted to speak with management in relation to the economic demands that had been presented by the Union." Daddona further pointed out (A. 107) that Mr. Pinella, a company representative, had advised him that "unless the Company paid more money his [Pinella's] men indicated that they would engage in a work stoppage and absenteeism."

None of the above testimony was ever disputed, denied or rebutted by any representative of the Union and it stands uncontradicted on the record.

It follows that after May 29 not only was there absenteeism and slowdown among the employees, but that the Union itself, as representative of all the employees, reneged on the implied promise made that upon returning to work without Company reprisal there would be no further continuation of the conduct illegal under 8(d) of the Act.

Certainly, it is a fair inference from the record as a whole that the absenteeism and slowdown after May 29, when coupled with the renewal of the illegal economic de-

mands constituted a rejection of the Company's condonation offer by both the Union and those it represented. Hence, under the *Poloron* case, as well as on the authority of other cases cited in the Company's Brief, and as well upon the theory of condonation advanced by the Company, it would appear that had this Court taken full note of the continued illegal activity of the Union, it would not have directed enforcement of the Board's Order.

Even if it be assumed that the Court is correct in holding that all the employees regained their status as employees because the Company condoned their illegal conduct, it does not necessarily follow that the Union regained its status as the bargaining representative. The illegal conduct of the Union in demanding contract changes and calling a strike to enforce such changes was never condoned by the Company. Even if it did, such condonation would have been vitiated by the Union's continuing insistence on such changes after May 29.

What originally deprived the Union of its representative status was the fact that it demanded changes in the contract without compliance with 8(d). Such would appear to be the holding in *Boeing* where the Court says:

> "We are of the view that the Union violated both Section 8(d) of the National Labor Relations Act, as amended, and the no-strike clause of its own contract and that it forfeited all rights to be considered as a collective bargaining agent for the employees of the Company." (p. 991)

When, after May 29, the Union continued to violate Section 8(d), the employer had no need to come forward with evidence casting serious doubt on the Union's majority status, as in the *Frick* case. Such status, by virtue of the continuing illegality, was never restored.

Neither the Trial Examiner nor the Board made any findings with respect to post-reinstatement activities of either the employees or the Union. As the Company's Brief pointed out, the lack of such findings was the logical consequence of the adoption by the Trial Examiner of an erroneous theory of condonation. The Court in its Opinion however decided that "it would seem clear that the Trial Examiner would not have credited the absenteeism and slowdown testimony [of Mr. Daddona] had he elected to make one on the subject." (Opinion, p. 11). By the same token, it would seem clear that the Trial Examiner, had he elected to make a finding on the issue, would have credited the testimony of Mr. Sackett that the Union, after May 29, continued to press its illegal demand for contract changes.

On the basis of such a finding, the applicability to the case at bar of the *Boeing* holding that there was no refusal to bargain, is appropriate and should have been followed.

B. While neither upholding nor rejecting the Company's theory of condonation, this Court assumes its validity and assumes further that a slowdown and absenteeism did occur. Nevertheless, the Court holds that *Graham* and *Boeing* do not support the claim that the Company did not have to bargain with the Union. The Court bases its conclusion on the fact that in the cited cases the entire plant went out on an illegal strike. In such a situation the employees no longer have status and the Union has no one to represent. Here, however, the Court goes on, they all went back to work. They thereby regained their status, as did the Union.

But if the Court assumes the validity of the Company's theory, then the employees never did regain their status and hence neither did the Union. This is so because under

the Company's condonation theory the effect of the Company's no reprisal agreement was vitiated when, by their acts, neither the Union nor the employees indicated any willingness to resume their duties and responsibilities.

In its Opinion, the Court also rejects the application of *Graham* and *Boeing* because "only those workers who actually participated in slowdown would lose their status via Section 8(d)."

As we have already pointed out, the Court's Opinion fails to note the extent of illegal Union activity after May 29. But that aside, the asserted underlying rationale of *Graham* and *Boeing* has nothing to do with the Company's theory of condonation. The Company did not make its no-reprisal offer on the condition that only *some* of the employees resume normal working relations, which is what the Court's Opinion suggests. What the Company bargained for was an entire package. It was for a resumption by *all* — Company, Union and employees alike — of such relations as a guarantee of industrial harmony. The breach of this bargain by some of the employees and by the Union, defeated the purposes of the condonation, and the employees and the Union reverted to their unprotected status.

For the above reasons it is respectfully requested that a rehearing be granted, and that the order of the Board be denied enforcement or, in the alternative, the matter be remanded to the Board.

SAMUEL GRUBER
Attorney for Respondent

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1098

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CAST OPTICS CORPORATION,
Respondent,

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

Present:

SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, and HUNTER, *Circuit Judges,* and BECKER, *District Judge.*

The petition for rehearing filed by respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(Sgd) FRANCIS L. VAN DUSEN
Judge

Dated: May 17, 1972